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No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

GOBEL LEE NEWSOME - - Petitioner/Appellant

versus

UNITED STATES OF
AMERICA - - - Respondent/Appellant

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

A. Whether retrial of Petitioner was barred by double jeopardy in light of the Government's conduct and withholding of evidence.

B. Whether Petitioner was denied his constitutional right to a speedy trial.

TABLE ON CONTENTS

	PAGE
Questions Presented	i
Table of Citations	iii
Jurisdiction	1
Constitutional Provisions Involved	1- 2
Statement of the Case	2- 8
Reasons for Granting the Writ	8-23
Conclusion	23
 Appendix	
Appendix A-1 (Order and Opinion of the Sixth Circuit Court of Appeals, October 17, 1989)	1a -6a
Appendix A-2 (Indictment No. 87-00001-01-L(B)	7a- 8a
Appendix A-3 (Reciprocal Order of Discovery January 22, 1987)	9a-11a
Appendix A-4 (Superseding Indictment No. 87-00063-01-L(B))	12a-14a
Appendix A-5 (Motion to Dismiss, April 30, 1987)	15a
Appendix A-6 (Memorandum and Order, August 12, 1987)	28a-29a

TABLE OF CITATIONS

	PAGE
<i>Brady v. Maryland</i> , 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)	11
<i>United States v. Agurs</i> , 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976)	11, 13
<i>Jones v. Jago</i> , 575 F. 2d 1164 (6th Cir. 1978)	12
<i>United States v. Shaffer</i> , 789 F. 2d 682 (9th Cir. 1986)	12, 13, 14
<i>United States v. Bagley</i> , 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)	12
<i>Giglio v. United States</i> , 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972)	13
<i>United States v. Dinitz</i> , 424 U.S. 607 (1976)	14
<i>Green v. United States</i> , 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 199 (1957)	16
<i>Oregon v. Kennedy</i> , 456 U.S. 667, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982)	15
<i>United States v. Salinas</i> , 693 F. 2d 348 (5th Cir. 1983)	18, 19, 21
<i>United States v. Hamm</i> , 659 F. 2d 624, 631 n. 23 (5th Cir. 1981)	19
<i>United States v. Derr</i> , 726 F. 2d 617 (10th Cir. 1984) ..	21



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GOBEL LEE NEWSOME - - - *Petitioner/Appellant*

v.

UNITED STATES OF AMERICA - - *Respondent/Appellee*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Gobel Lee Newsome, respectfully prays that a Writ of Certiorari issue to review the Order and Opinion of the Sixth Circuit of Appeals entered in this proceeding on October 17, 1989. (Appendix A-1, p. 1a).

JURISDICTION

The Opinion and Order of the Sixth Circuit Court of Appeals was entered on October 17, 1989. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when

in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal cases to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States provides that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

On January 5, 1987, the Grand jury for the Western District of Kentucky presented an indictment (Indictment No. CR 87-00001-01-L(B)), charging the Petitioner with three counts of Illegal Possession of a Handgun by a Convicted Felon, in violation of Title 18, United States Code, Section 1202(a)(1), based upon information received through search warrants dated two years earlier in 1985. (R:N/A, Appendix A-2, p. 7a) On January 20, 1987, the Petitioner, Gobel Lee Newsome, was arraigned in the United States District Court, Western District of Kentucky, at Louisville, on this Indictment, and entered a plea of not guilty to the charges. The case was passed to January 28, 1987, for further proceedings.

Specifically, this indictment set forth three counts: Count One alleging possession "On or about and between the 9th day of January, 1985, and the 23rd of January, 1985", after having been convicted on August 11, 1982, of Receiving Stolen Property Over \$100; Counts Two and Three both alleging possession "On or about the 23rd day of January, 1985", after having been convicted on August 11, 1982, of Receiving Stolen Property Over \$100.

At the time of arraignment, Petitioner's counsel, in open court, acknowledged receipt of two tapes of alleged conversations with the Petitioner dated January 9, 1985 and January 14, 1985. On January 22, 1987, the District Court entered a Reciprocal Order of Discovery which specifically provided the Petitioner was to receive "any tape recording made by government agents of any conversation with the Defendant". (R:N/A, Appendix A-3, p. 9a) Thereafter, several requests were made by Petitioner's counsel for production of any other tapes which may have been in existence; however, the Assistant United States Attorney, Honorable Terry Cushing, denied existence of any other tapes.

On March 9, 1987, Petitioner made an oral motion for suppression and the matter was assigned to March 30, 1987. However, by written notice dated March 20, 1987, Petitioner withdrew his former oral Motion for Suppression which was withdrawn by the Court on March 23, 1987. Nevertheless, on or about April 1, 1987, Petitioner's counsel received two more tapes, regarding a conversation occurring on January 21, 1985. Petitioner's Motion to Withdraw the prior Motion to Suppress was based upon the fact that Petitioner's counsel had reviewed the search warrants and tapes given to Petitioner's counsel on January 28, 1987. At the time of the Motion to Withdraw the prior Motion

to Suppress, Petitioner's counsel was not aware of the existence of another tape of an alleged conversation with Petitioner on or about January 21, 1985.

On March 30, 1987, the Petitioner again appeared with Counsel for further proceedings and the United States Attorney was ordered at that time to furnish Counsel for the Petitioner any *Brady* material when the matter became available to the United States. The case was then set for further proceedings on April 13, 1987. On that date, Petitioner once more appeared with Counsel and was informed that the case would be tried on April 20, 1987.

However, on April 14, 1987, without notice to the Petitioner or his counsel, and *one day after the last hearing* on further proceedings, the United States Attorney filed an *ex parte* order for dismissal pursuant to Rule 48A of the Federal Rules of Criminal Procedure requesting the Court to dismiss the original Indictment, Indictment No. 87-00001-01-L(B), on the ground that it was going to present a Superseding Indictment against the Petitioner. On or about April 15, 1987, Honorable Thomas Ballantine signed the Order of Dismissal which was entered into the Court's record on that date. Subsequently, on or about April 20, 1987, a Superseding Indictment, Indictment No. 87-00063-01-L(B), was filed with the United States District Court, Western District of Kentucky, charging the Petitioner with the same three counts of violations of Title 18, Section 1202(a)(1), as set forth in the original indictment. (R:1, Appendix A-4, p. 12a). Subsequently, on or about April 28, 1987, Petitioner's counsel was still given *additional* discovery by the United States Attorney's Office pertinent to Petitioner's case. None of this information had been previously given to Petitioner's counsel and he was unaware of its existence until that time. Therefore,

on April 30, 1987, Petitioner filed a Motion to Dismiss based upon the Government's failure to disclose evidence and discovery required and in accordance with the Federal Rules of Criminal Procedure. (R:4, Motion to Dismiss).

Also on April 30, 1987, Petitioner filed a Motion to Dismiss both indictments based upon a violation of the Speedy Trial Act, because of the Government's failure to proceed with trial on the original indictment when scheduled on April 20, 1987. (R:5, Appendix A-5, p. 15a). Petitioner was arraigned on the Superseding Indictment on May 6, 1987, and ordered to appear for purposes of jury selection on May 7, 1987. As the Petitioner objected to the commencement of jury selection on May 7, 1987, the District Court remanded the case from the May 11, 1987 trial docket. Thereafter, the District Court overruled the Petitioner's Motions to Dismiss based upon discovery and speedy trial violations. (R:19, Appendix A-6, p. 28a). The case was subsequently scheduled for trial on September 14, 1987.

The heart of the Government's case centered around conversations Petitioner allegedly had with an informant, Frank Manning, which were recorded by electronic means through a body microphone placed on Mr. Manning. Mr. Manning testified in the Government's case-in-chief; however, at the request of the Assistant United States Attorney and agreed to by Petitioner, the address of this informant was never made public or given to Petitioner. Also during the Government's case-in-chief, Agent Mike Scanlon of the Bureau of Alcohol, Tobacco and Firearms (hereinafter referred to as A.T.F.) was called to testify. Mr. Scanlon appeared to be the last witness to testify in the case on behalf of the Government. When Mr. Scanlon was questioned about the four tapes that had previously been

furnished to Petitioner's counsel, he admitted that there were other tape recordings of Petitioner which were in his custody that had not been furnished to either the Petitioner or his counsel. When asked why these tapes had not been provided to Petitioner or his counsel, Agent Scanlon testified that he was told not to provide these tapes to the Petitioner by the Assistant United States Attorney. (Agent Scanlon at T.R. 7-9).

At this time Petitioner's Counsel made a Motion for Mistrial based upon the conduct of the Government in intentionally and unilaterally withholding evidence material to the preparation of Petitioner's case and which had previously been ordered to be provided to Petitioner. (Agent Scanlon at T.R. 10-12). Petitioner's motion was denied at this time.

Subsequently, on September 17, 1987, the United States District Court granted Petitioner's Motion for a Mistrial. According to the Court:

After hearing the arguments of counsel, it became apparent to the Court that certain tape recordings of conversations to which defendant was a party have not been furnished to Counsel for Defendant. Since the other participant in their conversations was a witness who had already testified and whose whereabouts were not made known to counsel for Defendant, it became apparent to the Court the Defendant was deprived of his right to a fair trial and his right to confront the witness who had participated in the recorded conversations. (R:24, Memorandum and Order).

On September 23, 1987, Petitioner filed a Motion to Bar Further Proceedings pursuant to the Double Jeopardy Provisions of the Fifth Amendment to the United States Constitution. (R:26, Motion to Bar Further Proceedings).

The Assistant United States Attorney, Honorable Terry Cushing, even admitted at the bench that several tapes containing statements made by Petitioner were misplaced "or something" in the A.T.F. Office. Upon discovery of these tapes, Mr. Cushing stated that *he* made the decision the tapes were not helpful to the Petitioner's defense or discoverable; therefore, he did not inform Petitioner or his Counsel of the existence of such tapes to provide them to Petitioner. (Agent Scanlon, pages 10-12).

On October 7, 1987, Judge Ballantine denied Petitioner's Motion to Dismiss the Indictment on Double Jeopardy Grounds. (R:31, Memorandum and Order). Thereafter, Petitioner appealed the limited question of double jeopardy to the Sixth Circuit Court of Appeals. A decision on that appeal was rendered on June 28, 1988. (R:46).

Subsequently, Petitioner went back to trial on December 16 and December 19, 1988. The witnesses for the Government had now had plenty of time to review their testimony and to shore up the inconsistencies which the tapes had shown. The Petitioner entered a plea of guilty on December 19, 1988, to Count One of the Superseding Indictment. Petitioner specifically entered a conditional plea of guilty under Federal Rules of Criminal Procedure 11(a) (2). (R:53). Petitioner reserved his right to appeal concerning a violation of the Speedy Trial Act, 18 United States Code 3161, and failure of the Trial Court to dismiss the charges because of the Government's failure to grant discovery. (Change of Plea at hearing December 19, 1988, pp. 2-11). It is interesting to the Petitioner that counsel for the Government at the second trial was a different United States Attorney.

Petitioner filed a Notice of Appeal to the Court of Appeals of the Sixth Circuit on the grounds that it would be

a violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution to force him to endure a retrial in light of the overruling evidence of prosecutorial misconduct and overreaching. (R:57). Furthermore, Petitioner alleged a violation of the Sixth Amendment to the United States Constitution denying him his right to a speedy trial. However, by Opinion and Order dated November 8, 1989 (Appendix A-1, p. 1a), the Court of Appeals of the Sixth Circuit affirmed the Trial Court's denials of both Motions.

REASONS FOR GRANTING THE WRIT

To Allow Retrial of Petitioner in Light of the Overruling Evidence of Prosecutorial Misconduct and Overreaching Would be in Complete Derogation of the Double Jeopardy Provisions of the Fifth Amendment to the United States Constitution.

On January 20, 1987, the Petitioner was arraigned on Indictment No. CR 87-00001-01-L(B), and entered a plea of not guilty. At the time of arraignment, Petitioner's counsel, in open court, acknowledged receipt of two tapes of alleged conversations with the Petitioner dated January 9, 1985 and January 14, 1985.

On January 22, 1987, the District Court entered a Reciprocal Order of Discovery which specifically provided the Petitioner was to receive "any tape recording made by government agents of any conversation with the defendant". Thereafter, several requests were made by Petitioner's counsel for production of any other tape which may have been in existence; however, the Assistant United States Attorney denied existence of any other tapes.

On March 9, 1987, Petitioner made an oral motion for suppression and the matter was assigned to March 30, 1987. However, by written notice dated March 20, 1987, Peti-

tioner withdrew his former oral Motion for Suppression which was withdrawn by the Court on March 23, 1987.

Nevertheless, on or about April 1, 1987, Petitioner's counsel received two more tapes, regarding a conversation occurring on January 21, 1985. On March 30, 1987, the Petitioner again appeared with counsel for further proceedings and the United States Attorney was ordered at that time to furnish counsel for the Petitioner any *Brady* material when the matter became available to the United States.

Then, on April 14, 1987, the United States Attorney filed an *ex parte* order for dismissal, which was signed by the Judge on or about April 15, 1987. Subsequently, on April 20, 1987, a Superseding Indictment was filed charging the Petitioner with the same three counts of violations of 18 U.S.C. 1202(a)(1).

On or about April 28, 1987, Petitioner's counsel was still given additional discovery by the United States Attorney's Office pertinent to Petitioner's case. None of this information had been previously given to Petitioner's counsel, and he was unaware of its existence until that time. Therefore, on April 30, 1987, Petitioner filed a Motion to Dismiss based upon the Government's failure to disclose evidence and discovery required in accordance with the Federal Rules of Criminal Procedure. This Motion was overruled by the District Court, and trial on the Superseding Indictment was scheduled for September 14, 1987.

The Government's key witness was the informant, Frank Manning. Agent Mike Scanlon also testified in the Government's case-in-chief. When questioned about the four tapes previously furnished to Petitioner's counsel, Agent Scanlon admitted that there were other tape recordings of Petitioner which were in his custody that had not been

furnished either to Petitioner or his counsel. When asked why these tapes had not been provided to Petitioner, Agent Scanlon testified that he was told not to provide these tapes to the Petitioner by the Assistant United States Attorney. (Transcript of Proceedings, pp. 7-9).

At this time Petitioner made a motion for a Mistrial based upon the conduct of the Government in intentionally and unilaterally withholding evidence material to the preparation of Petitioner's case which had previously been ordered to be provided to Petitioner. Petitioner's motion was denied. Subsequently, on September 17, 1987, the United States Court granted Petitioner's Motion for a Mistrial. According to the Court:

After hearing the arguments of counsel, it became apparent to the Court that certain tape recordings of conversations to which Defendant was a party have not been furnished to Counsel for Defendant. Since the other participant in their conversations was a witness who had already testified and whose whereabouts were not made known to counsel for Defendant, it became apparent to the Court the Defendant was deprived of his right to a fair trial and his right to confront the witness who had participated in the recorded conversations. [R:24, Memorandum and Order].

On October 7, 1987, Judge Ballantine denied Petitioner's Motion to Dismiss the Indictment on Double Jeopardy Grounds. And, on December 19, 1988, Petitioner changed his not guilty plea and entered a plea of guilty to Court One of the Indictment, reserving this issue for appeal. [Change of Plea, December 19, 1988, p. 2].

Under the Federal Rules of Criminal Procedure, Rule 16(d)(2):

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

The District Court, in the present case, declared a mistrial when it was discovered that the United States Attorney failed to comply with Rule 16 and with the Court's Reciprocal Order of Discovery. However, Petitioner contends dismissal of the Superseding Indictment was the more appropriate sanction under the circumstances.

In *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the United States Supreme Court stated, "We now hold that the suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution." *Id.*, 373 U.S. at 87, 83 S. Ct. at —, 10 L. Ed. 2d at 218.

As stated in *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), "the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial". *Id.* 427 U.S. at 104, 96 S. Ct. at 2398, 49 L. Ed. 2d at 350. The Court went on to hold:

In *Brady* the request was specific. It gave the prosecutor notice of exactly what the defense desired. Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by

the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable. *Id.*, 427 U.S. at 106, 96 S. Ct. at 2399, 49 L. Ed. 2d at 351.

The Sixth Circuit in *Jones v. Jago*, 575 F. 2d 1164 (6th Cir. 1978), followed the guidance of *Agurs* in concluding, "that the defense in specifically requesting the statement had a substantial basis for claiming both that it was exculpatory and for claiming that it was material". *Id.* at 1168. This Court concluded "under *Agurs* that the threshold of materiality is relatively low where a specific request is involved". *Id.* at 1169.

In *United States v. Shaffer*, 789 F. 2d 682 (9th Cir. 1986), the Ninth Circuit found failure to disclose impeachment evidence undermined the confidence in the trial outcome, so that a new trial was warranted. The Court in *Shaffer* followed the standard set forth in *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), "for determining when the withholding of *Brady* material by the Government requires reversal. The Court noted that *Brady* only requires the Government to disclose information 'material either to guilt or punishment.' . . . The Court then stated that the conviction must be reversed 'only if evidence is material in the sense that its suppression undermines confidence in the outcome of the trial' ". *Shaffer*, 789 F. 2d at 688.

Evidence affecting the credibility of a Government witness has been held to be material under the *Brady* doctrine.

Giglio v. United States, 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972). In *Shaffer*, the Government informed defense counsel of tapes that detailed the informant's involvement. Such "disclosure [however,] was inadequate because the Government also told Shaffer's counsel that these tapes would be of no value to Shaffer's defense". *Shaffer*, 789 F. 2d at 690.

In the present case, there was a specific request by Petitioner for disclosure of tape recorded conversations occurring between the Petitioner and the Government's informant. This request was renewed on more than one occasion, and the District Court's Reciprocal Order of Discovery specifically provided for Petitioner to receive "any tape recording made by government agents of any conversation with the defendant".

The District Court declared a mistrial in the present case to give defense counsel "an opportunity to decide for himself whether those tapes are relevant or irrelevant". [Motion for Mistrial, September 15, 1987, p. 10.] In its ruling, the Court noted, "I'm troubled by the way the Government has proceeded in this case, and I want to reject [the United States Attorney's] argument that the tapes are not discoverable". [Motion for Mistrial, p. 9].

The evidence was specifically requested by Petitioner and specifically suppressed by the Government. The tape recordings contained conversations between Petitioner and the Government's key witness, and such evidence could have been used by defense counsel in cross-examination of the key witness, which might have affected the outcome of the trial. Where there is such a specific request, the failure of the Government to provide the evidence to a defendant, is rarely excusable. *Agurs*, 427 U.S. at 106, 96 S. Ct. at 2399, 49 L. Ed. 2d at 351.

As in *Shaffer*, the fact that the United States Attorney did not see any relevance in the suppressed tapes is beside the point. Defense counsel obviously believed there would be material evidence on those tapes, and his request was ordered to be answered by the District Court.

Because the Government in the present case failed to disclose evidence which had previously been ordered to be disclosed without sufficient justification, Petitioner's conviction should be reversed as the Superseding Indictment should have been dismissed.

This Court has clearly recognized that the Double Jeopardy Clause protects a Defendant against Governmental actions intended to provoke mistrial requests and thereby subjects Defendants to the substantial burdens imposed by multiple prosecutions. *United States v. Dinitz*, 424 U.S. 607 (1976). According to this Court:

[The Double Jeopardy Clause] bars retrials where 'bad faith conduct by Judge or prosecutor' . . . threatens the harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorably opportunity to convict the defendant.

Dinitz, supra, at page 611. The Double Jeopardy Clause represents a constitutional policy of finality: If an accused is acquitted, he may not be prosecuted again for the same offense. Similarly, the accused also has a protected interest in having his guilt or innocence decided in one proceeding. Given the convoluted path the Government has taken in its attempt to obtain some kind of conviction of the Petitioner, one can only question the motives and intentions of the prosecution.

As early as January 22, 1987, the District Court ordered the Government to provide Petitioner with any tape record-

ing made by Government agents of any conversation with the Petitioner. Despite the several requests subsequently made by the Petitioner, in addition to a subsequent Court Order to provide such discovery, the Assistant United States Attorney withheld several tapes and in fact denied their existence even though he knew there were other tapes that did in fact exist.

The Double Jeopardy Clause specifically protects an accused from being subjected to the type of conduct exhibited by the Government in this case. The prosecution in the case at bar did not act negligently or inadvertently. *Oregon v. Kennedy*, 456 U.S. 667, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982). He intentionally withheld evidence which had on several occasions been previously ordered to be provided to the Petitioner. The facts of this case are almost unbelievable.

This Court cannot overlook the Government's ex parte dismissal of the original indictment and presentment of a Superseding Indictment which, although in substance alleged the identical three charges as presented in the original indictment, was nevertheless framed in language most assuredly meant to inflame and prejudice any jury panel. Despite the fact that the Government had initially relied upon a 1982 conviction of Receiving Stolen Property to prove the Petitioner's status as a convicted felon, it included a twenty year old 1961 conviction of Voluntary Manslaughter in its Superseding Indictment. Furthermore, the gross enlargements of time during which the alleged violations were supposed to have occurred, with Count Two alleging a four year time span and Count Three alleging a three year time span, are no more dispositive of any criminal activity than that set forth in the original indictment. If anything, the time periods are more vague.

Nevertheless, the Government expected the Petitioner to be prepared for trial the day after his arraignment on the Superseding Indictment. Fortunately, on motion of the Petitioner, the trial was continued until September 14, 1987. However, the Government has never attempted to present proof outside of the time limitations as framed in the initial indictment.

Despite this four month time span, the Government failed to provide and/or even acknowledge the existence of other tapes allegedly documenting conversations between the Petitioner and its informant, Frank Manning. In fact, the existence of these tapes was not learned until after a witness for the Government admitted at trial that there were other tapes, although he was told not to furnish Petitioner with those tapes on the insistence of the Assistant United States Attorney. This fact was made known to the Petitioner after the Assistant United States Attorney had informed the Court and Petitioner's counsel that there were no other tapes. It is inconceivable how the Assistant United States Attorney can make such a claim, knowing that other tapes were in existence.

The facts of this case clearly show the anxiety, embarrassment, expense and delay endured by Petitioner. *Green v. United States*, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957). The Petitioner has already had to endure not one but two indictments. He has had to endure the delay of being forced to continue his trial date from April to September, upon an ex parte request for dismissal by the United States only five days before his first trial was to begin. Even though the Government had been ordered several times to provide any and all tapes to the Petitioner, the Government did not do so; instead it has unilaterally withheld discovery and evidence material to the presentation of his case

The Petitioner submits that the Double Jeopardy Clause serves to protect an accused from the expense and anxiety caused by Governmental harassment. Most assuredly, the conduct of the Government in the case at bar rises to the level of harassment and prejudice which the Constitution seeks to prohibit. Thus, Petitioner respectfully requests this Court to grant the Petition for Writ of Certiorari.

To Allow Trial of Petitioner Violated the Sixth Amendment to the United States Constitution.

On January 5, 1987, the Grand Jury of the United States District Court, Western District of Kentucky, at Louisville, issued an indictment for the Petitioner on three counts of violations of 18 U.S.C. 1202(a) (1), Indictment No. 87-00001-01-L(B). On January 20, 1987, the Petitioner appeared for arraignment. On April 13, 1987, the Petitioner appeared with counsel and was told that the case would be tried on April 20, 1987.

However, without notice to the Petitioner or his counsel, on April 14, 1987, one day after the last hearing on further proceedings, the United States Attorney filed an ex parte order for dismissal pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure, requesting the Court to dismiss Indictment No. 87-00001-01-1(B). The only reason stated for the order of dismissal was that the United States intended to present a new indictment to the Grand Jury. On or about April 15, 1987, the Honorable Judge Thomas Ballantine signed the order of dismissal which was entered into the court's records on April 15, 1987.

Subsequently, on April 20, 1987, a Superseding Indictment, Indictment No. 87-00063-01-L(B), was filed with the United States District Court, Western District of Kentucky, charging the Petitioner with three counts of the

same violation of 18 U.S.C. 1202(a)(1) alleged in the original indictment. The only difference between the two indictments was the inclusion in all counts of a different felony conviction substantiating the basis of the Petitioner's status as a convicted felon. Further, the time periods in Counts Two and Three were expanded. However, the violations were the same as were the identification numbers and types of firearms allegedly possessed by the Petitioner.

Petitioner filed a Motion to Dismiss the Superseding Indictment based upon a violation of the Speedy Trial Act on April 30, 1987. Petitioner was arraigned on the Superseding Indictment on May 6, 1987, and ordered to appear for purposes of jury selection on May 7, 1987. Petitioner objected, and the District Court remanded the case from the May 11, 1987, trial docket. Thereafter, the District Court overruled the Petitioner's Motion to Dismiss based upon the speedy trial violation.

Under the Federal Rules of Criminal Procedure, a "United States Attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate". F. R. Cr. P. 48(a). In *United States v. Salinas*, 693 F. 2d 348 (5th Cir. 1983), the Fifth Circuit analyzed Rule 48(a) and stated:

That the leave of court requirement was added to allow the courts to exercise discretion over the propriety of a prosecutorial motion to dismiss . . . [because] the primary purpose of the rule is protection of a defendant's rights: '[t]he purpose of the rule is to prevent harassment of a defendant by charging, dismissing and re-charging without placing a defendant in jeopardy.' *Id.* at 351 (quoting *United States v. Cox*, 342 F. 2d 167, 171 (5th Cir. 1965), *cert. denied sub nom. Cox v. Hauberg*, 381 U.S. 935, 85 S. Ct. 1767, 14 L. Ed. 2d 700 (1965)).

The Court continued its analysis and held “[t]he key factor in a determination of prosecutorial harassment is the propriety or impropriety of the Government’s efforts to terminate the prosecution—the good faith or lack of good faith of the Government in moving to dismiss.” *Id.*

In *Salinas*, the Government moved to dismiss the Indictment on October 1, 1980, the day trial was scheduled to begin. “The only reason given by the Government for this motion was the ‘a Superseding Indictment will be sought’.” On October 7, 1980, a Superseding Indictment was returned which “was substantially similar to the first”. *Id.* at 350.

The *Salinas* decision set the standard in determining whether the prosecution acted in good faith in moving to dismiss. The Court found that “[a]lthough the burden of proof is not on the prosecutor to prove that dismissal is in the public interest [footnote omitted], the prosecutor is under an obligation to supply sufficient reasons—reasons that constitute more than ‘a mere conclusory interest’.” *Id.* at 352 (quoting *United States v. Hamm*, 659 F. 2d 624, 631 n. 23 (5th Cir. 1981) (en banc)).

There is a “presumption that the prosecutor acted in good faith in moving to dismiss the first indictment [however], that presumption is rebutted upon a showing of a lack of good faith”. *Id.* In *Salinas*, the Fifth Circuit held the presumption of good faith was rebutted because “the prosecutor in this case surely gave the district court nothing more than a ‘mere conclusory interest’—a Superseding Indictment would be sought—as a basis for dismissal of the Indictment”. *Id.*

The facts in the present case are strikingly similar to those in *Salinas*. The United States Attorney in the present case filed an ex parte order for dismissal of the original

Indictment, which was granted by the District Court April 15, 1987, five days prior to the originally scheduled trial date. The only reason given for the need for dismissal was that "a Superseding Indictment [would] be sought", and the "second Indictment was substantially similar to the first". *Id.* at 350. The Superseding Indictment was returned April 20, 1987.

In an April 13, 1987 hearing on the Superseding Indictment, the United States Attorney stated, "the indictment is essentially the same". [Transcript of Proceedings at Hearing held on April 13, 1987, hereinafter referred to as Transcript of Proceedings, April 13, 1987, p. 6]. It was at this hearing on April 13, 1987, when the United States Attorney realized that no Superseding Indictment had yet been presented to the Grand Jury and would not be presented until April 20, 1987, the day the trial was scheduled to begin on the original indictment. [Transcript of Proceedings, April 13, 1987, p. 7].

Therefore, on April 14, 1987, the United States Attorney sought a dismissal of the original indictment for the sole reason that the United States intended to present a new indictment to the Grand Jury. In responding to defense counsel's Motion to Dismiss the Superseding Indictment, the United States Attorney stated:

Following the Court appearance on April 13, the United States was faced with the decision to either forego presentation of the Superseding Indictment to the April 20 Grand Jury and go to trial on the original Indictment, or to dismiss the original Indictment in favor of presenting the Superseding Indictment. The decision was made that it would be in the best interests of justice to proceed on the Superseding Indictment as planned, so the original Indictment was dismissed

April 14, 1987. [Response or Motion to Dismiss (On Speedy Trial Act Grounds), pp. 4-5]

In a footnote to this statement, the United States Attorney insisted, "The United States was facing no problems with respect to its proof on the original Indictment." [Response to Motion to Dismiss, p. 4 fn. 2.]

In *United States v. Derr*, 726 F. 2d 617 (10th Cir. 1984), the Tenth Circuit followed the reasoning advanced by the Court in *Salinas* and reiterated that "to honor the purpose of the rule [Rule 48(a)], the trial court at the very least must know the prosecutor's reasons for seeking to dismiss the indictment and the facts underlying the prosecutor's decision". *Id.* at 619.

The Court in *Derr* found that the Government's dissatisfaction "with the state of the investigation and the state the charges were in" was not a valid reason for the District Court's granting of the motion to dismiss. Rather, the Court found that "dismissing the second indictment was the only sanction that would effectuate the primary purpose of Rule 48(a)". *Id.*

The Court in *Salinas* began its review with "the presumption that the prosecutor acted in good faith", but then found that the prosecutions' dissatisfaction with the jury selected "raised a clear inference of absence of good faith on the part of the Government". *Salinas*, 693 F. 2d at 352. The Court went on the find "that the government used Rule 48(a) to gain a position of advantage or 'to escape from a position of less advantage in which the Government found itself as the result of its own election' ". *Id.* at 353.

Certainly this Court must also begin its review with the presumption that the United States Attorney acted in good faith in moving to dismiss the original indictment.

However, when looking at the reasons advanced by the Government for dismissing the original Indictment, it is argued that this Court will see a clear inference of the absence of good faith on the part of the Government, and dismissing the second Indictment was the only proper sanction under Rule 48(a).

In the present case, the United States Attorney did not like the prospect of being forced to trial, although he argued the United States was facing no problem with going forward on the original Indictment. In fact, the United States Attorney's only reason for not going forward on the original Indictment was that the United States intended to present a new Indictment to the Grand Jury. However, this Superseding Indictment was essentially the same as the first Indictment.

If, in fact, as defense counsel suggested, the United States sought a dismissal of the original Indictment because the Government's informant was unavailable, there were other avenues available to the Government, including a continuance of excludable time under the Speedy Trial Act, 18 U.S.C. 3161(h)(3)(A). Such other avenues of relief should be utilized when available. *Salinas*, 693 F. 2d at 353.

The Trial Court erred in dismissing the original Indictment without sufficient reasons supplied by the United States Attorney. Further, the Trial Court erred in not dismissing the Superseding Indictment as such was the only sanction that would have achieved the primary purpose of Rule 48(a). Because of the Trial Court's abuse of discretion Petitioner's conviction should be reversed.

Petitioner was denied his right to a speedy trial guaranteed by the Sixth Amendment to the United States Constitution and the Government should not have been allowed

to circumvent this constitutional right by the methods employed in this prosecution.

CONCLUSION

The reasons for granting a Writ, set forth above, clearly enunciate substantial questions of constitutional law which should be settled by this Court. Therefore, Petitioner requests that this Petition for Writ of Certiorari should be granted.

Respectfully submitted.

JOHN TIM McCALL

200 Hart Block Building

730 West Main Street

Louisville, Kentucky 40202

(502) 589-6190

Counsel or Petitioner



APPENDIX

APPENDIX

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
See Sixth Circuit Rule 24.

No. 89-5173

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee.*

v.

GOBEL LEE NEWSOME, - - *Defendant-Appellant.*

*On Appeal from the United States District Court
For the Western District of Kentucky*

Decided and Filed October 17, 1989

Before: KRUPANSKY and WELLFORD, Circuit Judges; and
HARVEY, Senior United States Judge.*

PER CURIAM: The defendant, Gobel L. Newsome, was indicted by a grand jury in the Western District of Kentucky on three counts of possession of firearms by a convicted felon in violation of 18 U.S.C. § 1202(a)(1). Newsome was arraigned and the government provided some initial discovery. The government provided subsequent further discovery including copies of the tapes of two taped conversations.

Newsome's counsel then orally advised the district court that he intended to file a motion to suppress, and he contacted the Assistant U.S. Attorney handling the case to inquire whether the government intended to use at trial the tape recordings that had been provided to him and to ask about the existence of any other tape recordings from the

date of January 21, 1985. The Assistant U.S. Attorney advised counsel that he did not intend to use any tapes at trial and that the equipment malfunctioned on January 21, 1985, so that no recording was made. Defense counsel accordingly withdrew his motion to suppress, and the district court converted the scheduled suppression hearing to a date to discuss further proceedings in the case.

Newsome's counsel stated that there was no evidence arguably subject to suppression and requested any additional exculpatory evidence and the criminal record of a potential government witness, Frank Manning. The government stated that it did not intend to introduce any tapes in its case-in-chief at trial and again stated that no tape was made of the conversation on January 21, 1985. The government informed that district court and defense counsel, however, that it intended to present a superseding indictment at the next grand jury meeting on April 6, 1987.

On April 14, 1987, the United States filed for an entry of an order of dismissal pursuant to Rule 48(a) of the Fed. R. Crim. P., requesting the district court to dismiss the original indictment on the grounds that the government intended to present the previously discussed superseding indictment. The district court signed the order of dismissal on April 15, 1987.

On April 20, 1987, the superseding indictment was presented to and returned by the grand jury and then filed with the district court, charging Newsome with the similar three counts of violating 18 U.S.C. § 1202(a)(1). The indictment included expanded time periods during which Newsome possessed the firearms charged and substituted a prior felony conviction for one that had been in the original indictment to cover the expanded period. The gov-

*The Honorable James Harvey, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

ernment states that it provided defense counsel with further discovery regarding the expanded charges, but there is dispute about whether the government furnished full discovery of tapes.

Disputes continued concerning continuances and whether the government had complied with discovery requirements. Ultimately a mistrial was declared, and Newsome pursued an appeal to this court contending that principles of double jeopardy should bar any retrial. In an opinion filed June 28, 1988 (No. 87-6148) we held that while prosecution was subject to censure for its performance in this case (and its oversights and withholding of tapes concerning discovery), there was also no "deliberate attempt to force a mistrial," and we could say that there was "overreaching," and in the absence of demonstrated prejudice, there was no "barrier to reprosecution."

The government is normally free to dismiss one indictment and bring another indictment based on further development of the case under Fed. R. Crim. P. 48(a). *United States v. Mendenhall*, 597 F. 2d 639, 641 (8th Cir. 1979). Newsome contends that the government's failure to provide details in the written motion to dismiss beyond advising that a superseding indictment would be sought is insufficient and requires dismissal with prejudice and a finding of violation of the requirement of a speedy trial. The defendant, however, must make a showing of bad faith or demonstrate prejudice to the ability to attack the prosecutor's motives because of the trial court's failure to require submission of adequate reasons.

Subsequent to arraignment of the defendant on the original indictment, the government obtained information that Newsome possessed one of the firearms charged in Count Two of the indictment in October 1981, when he was involved in a shooting. Newsome was a convicted felon at that time, but the conviction which preceded the shooting

was not contained in the original indictment. In order to add this conviction to support an expanded time period during which defendant possessed firearms as charged in Counts Two and Three, the superseding indictment was sought.

Newsome relies primarily upon *United States v. Derr*, 726 F. 2d 617 (10th Cir. 1984) and *United States v. Salinas*, 693 F. 2d 348 (5th Cir. 1982), in which subsequent indictments were dismissed with prejudice on the grounds that the government had given insufficient reasons for dismissing the prior indictments. These cases are easily distinguishable, however, in that the government's behavior was far more dilatory and egregious. In *Salinas*, for example, the government attorney admitted that he dismissed the earlier charges only because he was dissatisfied with the jury that had been empaneled. 693 F. 2d at 350. The Fifth Circuit stated:

Although the burden of proof is not on the prosecutor to prove that the dismissal is in the public interest, the prosecutor is under an obligation to supply sufficient reasons—reasons that constitute more than “a mere conclusory interest.”

Id. at 352 (footnotes omitted). The court of appeals specifically found that the defense had presented sufficient evidence to overcome the presumption that the government had made the motion to dismiss the indictment in good faith. *Id.* at 353.

In *Derr*, the United States moved to dismiss the indictment on the day of trial, stating only that dismissal would “best meet the ends of justice.” 726 F. 2d at 618. Without much inquiry, the district court granted the motion, and a subsequent indictment was not handed down until two and a half years later. *Id.* Relying mainly on *Salinas*, the Tenth Circuit reasoned that in order to prevent govern-

ment harassment of the defendant, "the trial court at the very least must know the prosecutor's reasons for seeking to dismiss the indictment and the facts underlying the prosecutor's decision." *Id.* (citations omitted). The Tenth Circuit recently observed in the course of rejecting a similar motion in *United States v. Stayer*, 846 F. 2d 1262, 1266 (10th Cir. 1988):

Derr did not *mandate* dismissal of subsequent indictment; we merely determined that the trial court did not abuse its discretion in granting the motion to dismiss. In addition, our holding on the remedy in *Derr* was clearly limited to its particular facts and circumstances.

These cases merely establish that dismissal of a prior indictment without dismissing the case will be upheld as long as the record contains sufficient reasons to enable review and the government is not guilty of bad faith. We cannot say that mishandling and sloppy discovery practices here equate to bad faith.

In this case, the United States' reasons for seeking dismissal of the original indictment were fully explained before the district court at the hearing on Newsome's motion to dismiss the subsequent prosecution with prejudice. The record is likewise clear that defense counsel was fully aware of the government's intentions and attempts to procure the superseding indictment prior to the first trial setting. There is no impropriety in the government superseding the original indictment to increase the prosecution's chances of conviction by adding another factual element to the case. *Mendenhall*, 597 F. 2d 641. We conclude, therefore, that it was not an abuse of discretion for the district court to dismiss the original indictment and allow the prosecution of Newsome to continue. There was

likewise no demonstrated failure to comply with speedy trial requirements.

We need not elaborate further concerning the discovery disputes in this case. As the retrial defendant was afforded the opportunity to attack and to counter, or even to utilize, any of the tapes involved in the investigation of these firearms charges. The prior panel of this court discussed these circumstances fully.

We find no demonstrated speedy trial violation in this record, nor has defendant demonstrated other reversible error.

Accordingly, we AFFIRM the convictions.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 87-00001-01-L(B)

UNITED STATES OF AMERICA

v.

GOBEL LEE NEWSOME

Filed January 5, 1987

The Grand Jury Charges:

COUNT 1

On or about and between the 9th day of January, 1985, and the 23rd day of January, 1985, in the Western District of Kentucky, Jefferson County, Kentucky, GOBEL LEE NEWSOME, having been convicted on August 11, 1982, in the Bullitt Circuit Court, of receiving stolen property over the value of \$100.00, a felony, did have in his possession a fire-arm, that is, a Ruger, .357 caliber revolver, Serial Number 155-48504, which had moved in interstate commerce.

In violation of Section 1202(a)(1), Title 18, Appendix, United States Code.

F 10 o I 2 o b

The Grand Jury further charges:

COUNT 2

On or about the 23rd day of January, 1985, in the Western District of Kentucky, Bullitt County, Kentucky, GOBEL LEE NEWSOME, having been convicted on August 11, 1982, in the Bullitt Circuit Court, of receiving stolen property over the value of \$100.00, a felony, did have in his possession the following firearms: a Gecado, .22 caliber revolver,

Serial Number 788433, a Smith & Wesson, .38 caliber revolver, Serial Number D553899, an AMT .380 caliber pistol backup model, Serial Number C07896 and a Harrington & Richardson 410 gauge shotgun, Serial Number AU629679, which have moved in interstate commerce.

In violation of Section 1202(a)(1), Title 18, Appendix, United States Code.

F 10 o I 2 o b

The Grand Jury further charges:

COUNT 3

On or about the 23rd day of January, 1985, in the Western District of Kentucky, Jefferson County, Kentucky, GOBEL LEE NEWSOME, having been convicted on August 11, 1982, in the Bullitt Circuit Court, of receiving stolen property over the value of \$100.00, a felony, did have in his possession the following firearms: a Colt, .25 caliber automatic pistol, Serial Number OD05463, an Ithaca 16 gauge pump shotgun, Serial Number 371098113, a Stevens 12 gauge double barrel shotgun, Model 311E, Serial Number A303240, a High Standard Sentinel, .22 caliber revolver, Serial Number 711281 and a Winchester .22 caliber semi-automatic rifle, Serial Number B1468939, which had moved in interstate commerce.

In violation of Section 1202(a)(1), Title 18, Appendix, United States Code.

F 10 o I 2 o b

A True Bill.

(s) Byron Hill
Foreman

(s) Joseph M. Whittle
Joseph M. Whittle
United States Attorney
JMW:TMC:srb

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Criminal Action No. 87-00001-01-L(B)

UNITED STATES OF AMERICA

v.

GOBEL LEE NEWSOME

RECIPROCAL ORDER OF DISCOVERY

Entered January 22, 1987

The Court having inquired of counsel for the defendant whether discovery is requested, counsel having affirmatively responded, and the United States having made no objection and having requested reciprocal discovery, and the Court being otherwise sufficiently advised.

IT IS HEREBY ORDERED AND ADJUDGED that the parties proceed to give reciprocal discovery pursuant to the provisions of Rule 16, Federal Rules of Criminal Procedure, subject to the limitations and conditions set forth therein, and including, not by way of limitation, the following:

The United States

The United States shall permit the defendant to inspect and copy or photograph:

1) Any relevant written or recorded statements made by the defendant or copies thereof within the possession, custody or control of the United States, the existence of

which is known or by the exercise of due diligence may become known to the United States Attorney.

2) The substance of any oral statement which the United States intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a Government agent;

3) Recorded testimony of the defendant before a Federal Grand Jury which relates to the offense charged

4) Books, papers, documents, photographs, tangible objects, buildings, or places or copies or portions thereof which are with the possessions, custody or control of the United States and which the United States intends to introduce as evidence in chief at the trial of this case.

5) Results of reports of physical or mental examinations and of scientific tests or experiments or copies thereof which are within the possession, custody or control of the United States, the existence of which is known or by the exercise of due diligence may become known to the United States Attorney, and which the United States intends to introduce as evidence in chief at the trial of this case.

6) Copy of the prior criminal record of the defendant, if any, that is within the possession, custody or control of the United States, the existence of which is known, or by the exercise of due diligence may become known, to the United States; and

7) Any tape recording made by Government agents of any conversation with the defendant.

The defendant

The defendant shall provide the following information to the United States for the purpose of inspection, examination and photocopying;

1) All books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are with in the

possession, custody or control of the defendant, and which the defendant intends to introduce as evidence in chief at the trial; and

2) Any results or reports of mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial, or which were prepared by a witness whom the defendant intends to call at trial when the results or reports relate to his testimony.

Compliance with this Order shall be accomplished on or before the 28th day of January, 1987.

(s) George J. Long
George J. Long
Chief U.S. Magistrate

Copies to:

United States Attorney
Counsel for Defendant

UNITED STATES DISTRICT COURT

**WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE**

**No. 87-00063-01-L(B)
(18 U.S.C. App. §1202(a)(1))**

UNITED STATES OF AMERICA

v.

GOBEL LEE NEWSOME

Filed April 20, 1987

COUNT 1

The Grand Jury Charges

On or about and between the 9th day of January, 1985, and the 23rd day of January, 1985, in the Western District of Kentucky, Jefferson County, Kentucky, GOBEL LEE NEWSOME, having been convicted on July 7, 1961, in the Commonwealth of Kentucky, of voluntary manslaughter, a felony, and having been convicted on July 20, 1982, in the Commonwealth of Kentucky, Jefferson Circuit Court, of trafficking in food stamps, a felony, did have in his possession a firearm, that is, a Ruger, .357 caliber revolver, Serial Number 155-48504, which had moved in interstate commerce.

In violation of Section 1202(a)(1), Title 18, Appendix, United States Code.

F 10 o I 2 o b

COUNT 2

On or about and between the 17th day of October, 1981, and the 23rd day of January, 1985, in the Western District of Kentucky, Bullitt County and Jefferson County, Kentucky, GOBEL LEE NEWSOME, having been convicted on July 7, 1961, in the Commonwealth of Kentucky, of voluntary manslaughter, a felony, and having been convicted on July 20, 1982, in the Commonwealth of Kentucky, Jefferson Circuit Court, of trafficking in food stamps, a felony, did have in his possession the following firearms: a Gecado, .22 caliber revolver, Serial Number 788433, a Smith & Wesson, .38 caliber revolver, Serial Number D553899, an AMT .380 caliber pistol backup model, Serial Number C07896 and a Harrington & Richardson 410 gauge shotgun, Serial Number AU629679, which had moved in interstate commerce.

In violation of Section 1202(a)(1), Title 18, Appendix, United States Code.

F 10 o I 2 o b

The Grand Jury further charges:

COUNT 3

On or about and between 1982, the exact date being unknown to the Grand Jury, and the 23rd day of January, 1985, in the Western District of Kentucky, Jefferson County, Kentucky, GOBEL LEE NEWSOME, having been convicted on July 7, 1961, in the Commonwealth of Kentucky, of voluntary manslaughter, a felony, and having been convicted on July 20, 1982, in the Commonwealth of Kentucky, Jefferson Circuit Court, of trafficking in food stamps, a felony, did have in his possession the following firearms: a Colt, .25 caliber automatic pistol, Serial Number OD05463, an Ithaca 16 gauge pump shotgun, Serial Number 371098-113, a Stevens 12 gauge double barrel shotgun, Model 311E, Serial Number A303240, a High Standard Sentinel, .22 cali-

her revolver, Serial Number 711281 and a Winchester .22 caliber semiautomatic rifle, Serial Number B1468939, which had moved in interstate commerce.

In violation of Section 1202(a)(1), Title 18, Appendix, United States Code.

F 10 o I 2 o b

A True Bill.

(s) Doris S. Even
Foreman

(s) Joseph M. Whittle
Joseph M. Whittle
United States Attorney
JMW:TMC:srb/pak

UNITED STATES DISTRICT COURT

**WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE**

**No. 87-00001-01-L(B)
87-00063-01-L(B)**

UNITED STATES OF AMERICA

v.

GOBEL LEE NEWSOME

MOTION TO DISMISS—April 30, 1987

Comes the Defendant, Gobel Newsome, by counsel, and requests this honorable court to dismiss the above-styled indictment as said indictment is presented in violation of Title 18 U.S.C. §3161 et. seq. In support of said motion see attached memorandum.

Respectfully submitted,

(s) John Tim McCall
John Tim McCall
Counsel for Defendant
200 Hart Block Building
730 West Main Street
Louisville, Kentucky 40202
(502) 589-6190

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 87-00001-01-L(B)
87-00063-01-L(B)

UNITED STATES OF AMERICA

v.

GOBEL LEE NEWSOME

MEMORANDUM—April 30, 1987

Comes the Defendant, Gobel Lee Newsome, by counsel, and states in support of his Motion to Dismiss as follows:

1. On or about January 5, 1987, the Grand Jury of the United States District Court, Western District of Kentucky, at Louisville, issued an indictment for the above-styled defendant on three counts of violations of Title 18, Section 1202(a)(1), Appendix, No. 87-00001-01-L(B). On or about January 20, 1987, the Defendant appeared for arraignment. The case was then passed until January 28, 1987 for further proceedings. On or about January 28, 1987, the Defendant appeared in person and the case was passed for further proceedings on March 9, 1987. On or about March 9, 1987, the Defendant appeared in person with counsel for the Defendant making an oral motion for suppression. The case was then passed to March 30, 1987, on Defendant's motion to suppress. On or about March 20, 1987, the Defendant filed with the District Court a Motion to Withdraw the Defendant's prior oral Motion to

Suppress. Counsel stated in his motion that as he had researched and reviewed the search warrants and the search at issue, he did not feel there was any issue warranting a hearing and asked the Court to allow him to withdraw his Motion to Suppress. On or about the 23rd day of March, 1987, the honorable Judge Thomas Ballantine granted the Defendant's Motion to Withdraw his oral Motion to Suppress. The case was then passed to March 30, 1987 for further proceedings. On March 30, 1987, the Defendant again appeared with counsel for further proceedings, with the United States Attorney being ordered to furnish with the counsel for the Defendant any *Brady* material when the matter becomes available to the United States. The case was set for further proceedings on or about April 13, 1987. On or about April 13, 1987, the Defendant then appeared with counsel and counsel for the Defendant was told that the case would be tried on April 20, 1987. However, without notice to the Defendant or his counsel, on or about April 14, 1987, one day after the last hearing on further proceedings, the United States Attorney filed an ex parte order for dismissal pursuant to Rule 48A of the Federal Rules of Criminal Procedure requesting the Court to dismiss Indictment No. 87-00001-01-L(B). The only reason stated for the order of dismissal was that the United States intended to present a new indictment to the Grand Jury. On or about April 15, 1987, the honorable Judge Thomas Ballantine signed the order of dismissal which was entered into court's records on April 15, 1987. Subsequently, on or about April 20, 1987, a superseding indictment, Indictment No. 87-00063-01-L(B), was filed with the United States District Court, the Western District of Kentucky, charging the Defendant with three counts of the same violations of Title 18, Section 1202(a)(1), Appendix, as set forth in Indictment 87-00001-01-L(B). The only difference between the two indictments was the inclusion in all counts

of a different felony conviction substantiating the basis of the Defendant's status as a convicted felon, in all three counts and the expansion of time periods in Counts Two and Three, with Count Two allegedly occurring "on or about and between the 17th day of October, 1981, and the 23rd day of July, 1985" and Count Three being alleged to have occurred "on or about and between 1982, the exact date being unknown to the Grand Jury, and the 23rd day of January, 1985." The violations are the same as well as the identification number and types of firearms allegedly possessed by the Defendant.

2. Pursuant to Title 18, Section 3161, Speedy Trial Act;

(C)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date, and making public of the information or indictment, or from the date the defendant has appeared before judicial officer of the court in which such charges pending, whichever date last occurred.

The original indictment was filed with the District Court on or about January 5, 1987. The Defendant appeared before the United States District Court for the Western District of Kentucky on or about January 20, 1987. Therefore, calculations of the seventy day time limitations contained in Section 3161 of Title 18, hereinafter referred to Section 3161, the computation shall begin with the January 20, 1987 date. On or about April 14, 1987, the Assistant United States Attorney, Honorable Terry Cushing, filed an ex parte order for dismissal pursuant to Rule 48A of the Federal Rules of Criminal Procedure. At that time the Assistant United States Attorney stated that the reason for the dismissal was that the United States intended to

present a new indictment to the Grand Jury. Pursuant to Rule 48A of the Federal Rules of Criminal Procedure, the United States Attorney may move for dismissal of the case "with leave of court". The Defendant submits that the order of dismissal, however, was filed solely for the purpose of delay to give the United States additional time within which to locate their alleged confidential informant and/or include additional time periods to permit the use of an event occurring in 1981, to substantiate the alleged violations of Section 1202 of Title 18, illegal possession of firearms. The Defendant submits that the United States filed the motion to dismiss pursuant to Rule 48A in bad faith and with the intent only to gain additional time by the filing of a superseding indictment. According to the Defendant's calculations, correctly excluding the time periods involved for disposition of the Defendant's Motion to Suppress, the United States moved for an order of dismissal on the seventieth day after the Defendant's original arraignment. The Defendant states that March 9 through March 23, 1987 should be excluded as those are the dates within which the Motion to Suppress was under submission. Judge Ballantine signed the order granting the Defendant's Motion to Withdraw his oral Motion for Suppression on or about March 23, 1987. Therefore, the time period as regards the Speedy Trial Act should begin to run on March 24, 1987. Defendant submits that as the United States knew they were running out of time in order to try to locate their alleged informant and therefore needed additional time to locate their informant or seek other proof by which they may substantiate their charges against the defendant, the original indictment must have been dismissed and a new indictment presented. However, the Defendant states such tactics are clearly in violation of the technical reading of the act as well as the spirit of the

Speedy Trial Act and Rule 48A of the Federal Rules of Criminal Procedure.

Additionally it should be noted that the Defendant received no notice whatsoever of the United States' intentions to file a Motion for Dismissal and received no notice of the United States' actual filing of such Motion for Dismissal on or about April 14, 1987. It was only after the case was dismissed that the Defendant received knowledge of that fact. The Federal Rules of Criminal Procedure Rule 48A set forth the "leave of court" requirement that any Motion to Dismiss must be reviewed and considered by the District Court prior to the dismissal of an indictment. At common law the prosecutor had the unrestricted authority to enter an order of dismissal without the consent of the Court at any time prior to the swearing of the jury. Rule 48 redefines the common law and requires the Court to consider the dismissal. This check on the power of the executive branch was included to protect the public interest.

Although the Supreme Court has not delineated the circumstances in which this discretion [over the propriety of a prosecutorial motion to dismiss] may be exercised, the courts have agreed that the primary purpose of the rule is protection of a defendant's right: the purpose of the rule is to prevent harassment of a defendant by charging, dismissing and recharging without placing a defendant in jeopardy.

United States v. Salinas, 693 F. 2d 348 (5th Cir. 1982) citing *United States v. Cox*, 342 F. 2d 167 (5th Cir. 1965) cert. denied sub. nom. *Cox v. Hauberg*, 381 U.S. 935 (1965). The Fifth Circuit in *Salinas*, *supra*, further states:

This prosecutorial harassment involves charging, dismissing and subsequently commencing another prosecution at a different time or place deemed more favorable to the prosecution . . . The key factor in a de-

termination of prosecutorial harassment is the propriety or impropriety of the government's efforts to terminate the prosecution—the good faith or lack of good faith of the government in moving to dismiss. The government must not be motivated by considerations ‘cruelly contrary to the public interest.

693 F. 2d at page 351.

In *Salinas, supra*, the Court of Appeals of the Fifth Circuit held that the filing of a superseding indictment was insufficient to support a dismissal where the real reason for the dismissal was the government's dissatisfaction with the jury. In the case at bar the Motion to Dismiss was made before the jury was impaneled. The United States simply did not like their chances of going to trial at that time; therefore, they moved to dismiss upon the explanation that a superseding indictment would be forthcoming. The Fifth Circuit stated that this was not sufficient to warrant dismissal and that the dismissal was not made in good faith. The Tenth Circuit has agreed with the Second Circuit in requiring dismissals with prejudice when the dismissals are made in bad faith and for the purposes of harassment. In *United States v. Derr*, 726 F. 2d (10th Cir. 1984), the Tenth Circuit dismissed with prejudice a superseding indictment for the Defendant after the initial indictment had been dismissed on motion of the government, to “best meet the ends of justice”. At a subsequent hearing on the Defendant's Motion to Dismiss the second indictment, in effect requiring the first dismissal to have been with prejudice, the Tenth Circuit concluded that the second indictment must be dismissed. At the hearing the United States Attorney explained his position at the time of the initial Motion to Dismiss the first indictment:

I was dissatisfied with the state of the investigation and the state the charges were in. So, we moved to

dismiss for the purpose of continuing the further investigation into the matter

726 F. 2d at page 619.

According to the Court:

Unless the government could articulate a better reason for dismissal than this, we think the trial court would have had to deny the motion considering it was made over the Defendant's objection and on the day trial was scheduled to begin.

726 F. 2d at page 619.

The present case is clearly analogous to the facts of both the *Derr* and *Salinas* cases. The United States government did not like the prospect of perhaps being forced to trial with the informant not being present and without any means by which to prove any alleged illegal possession of firearms. They simply by ex parte motion moved the Court for dismissal knowing that they would indict the Defendant subsequently when the circumstances were more favorable to them.

According to Rule 48A the Defendant's *consent* is not necessary for dismissal prior to trial. Be that as it may, this is not to say that the Defendant was not required to have received notice and that his views be aired on this matter. According to the United States District Court for the Northern District of Ohio, in *United States v. Friedman*, 107 F.R.D. 736 (1985):

The Defendant's personal objection to the dismissal is also a factor to be adjudged. The Court is of the opinion that when the motion for new trial was granted, the instant case reverted to its pretrial stage and not to a trial stage as contemplated in the second sentence of Rule 48A. This being so, Mr. Friedman's consent

to the dismissal motion is not required. This is not to say, however, that the concerns voiced by him should not be given some deference by this Court. Defendant's past to this point in the proceedings include his indictment, his public trial, his conviction and Appellate process. This, to say the least, gives him a personal interest in the fate of the motion under discussion.

107 F.R.D. at page 742.

Clearly the Defendant in the case at bar has a deep personal interest in the dispositions of the proceedings. If the Defendant were allowed to proceed to trial at the original date, April 20, 1987, and the United States would not have been able to have produced their informant, and therefore proven their case beyond a reasonable doubt, the defendant would have been acquitted, and the prohibition against double jeopardy would certainly have not allowed him to have been subsequently reindicted and retried on the same charges. The government was running out of time and now cannot get information in through the back door that they could not have originally gotten in through the front door.

An analogous situation was considered by the Second Circuit in *United States v. Caparella*, 716 F. 2d 976 (2nd Cir. 1983). When discussing Section 3161(B) of Title 18, requiring the government to file an indictment or information within thirty days after the arrest of a Defendant, the Court set forth the theories supporting the Speedy Trial Act as law. The Court in *Caparella* reversed the District Court's adoption of the Magistrate's ruling that the criminal complaint could be dismissed without prejudice. The Second Circuit stated that:

. . . We considered the affect of the dismissal of this prosecution on the administration of justice. As the

deterrent to other would-be offenders, it seems relatively insignificant. Of greater significance to the administration of justice is the salutary affect of this court's reaffirmance of Congress' basic purpose in enacting the speedy trial act . . . It must be remembered that a speedy trial is not only viewed as necessary to serve the rights of defendants. Just as significant is the protection of accords to societies interest in bringing criminals to justice promptly.

Therefore, the speedy trial act can be considered a two way street. Just as the defendants cannot prolong disposition of the proceedings in hopes that the government's witnesses may become forgetful or ambivalent, the government cannot prolong the proceedings and choose to only prosecute the defendant when the circumstances seem most favorable to the government. The Court in *Caparella* further recognized that:

Unlike the speedy trial rights of an accused under the Sixth Amendment, . . . the [Speedy Trial] Acts purpose was to fix specific and arbitrary time limits within which the various stages of a criminal prosecution must occur.

716 F. 2d page 981.

Pursuant to Section 3162 of Title 18, Section 2:

In determining whether to dismiss the case with or without prejudice, the Court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which lead to the dismissal; and the impact of a re-prosecution on the administration of his chapter and on the administration of justice.

The Court must recognize that the government at this time is trying to prosecute the above-styled Defendant for

illegal activity allegedly occurring over two years ago. If the government had thought the charge were of significance, it is not clear why they have waited approximately two years to now charge the Defendant with criminal activity. This Court must also recognize that the Motion to Dismiss was filed by the United States Attorney on the seventieth day following the Defendants' arraignment. Clearly the government was running out of time and they needed additional time to either find their informant or produce other proof to substantiate their claims. The informant had failed to appear in Jefferson Circuit Court, Division One, on the cases of Commonwealth v. Winkle, Indictment No. 86CR1230 and Indictment No. 85CR1091, within two weeks prior to the original day of trial on the Defendant's above-styled case. As the informant had failed to appear in Jefferson Circuit Court on two separate occasions to prosecute those charges in state court, Judge Eckert dismissed the cases against the Defendant Winkle. It was only upon the filing of the superseding indictment, that the government listed other events and dates with which they may try to prove any illegal activity on behalf of the Defendant. If the government had been required to go to trial on the 20th of April, 1987, and their witness had not been available and no other proof allowed in to substantiate their claims, the government may not have been able to have proven their claims beyond a reasonable doubt and the Defendant may have been acquitted. Therefore, no reprosecution would have been allowed pursuant to the guarantees against double jeopardy given by the United States Constitution. The government now cannot be allowed to reprosecute the Defendant on a superseding indictment when a reprosecution would not have been allowed if they had been forced to trial on April 20, 1987 and had not proven their case beyond a reasonable doubt. Therefore, pursuant to Section 3162 of Title 18, Section 2,

the superseding indictment must be dismissed with prejudice.

(s) John Tim McCall
John Tim McCall
Counsel for Defendant
200 Hart Block Building
730 West Main Street
Louisville, Kentucky 40202
(502) 589-6190

CERTIFICATE

This is to certify that a copy of the foregoing was hand delivered to the Hon. Terry Cushing, Assistant United States Attorney, Bank of Louisville Building, 510 West Broadway Street, Louisville, Kentucky 40202, on this 30th day of April, 1987.

(s) John Tim McCall
John Tim McCall

UNITED STATES DISTRICT COURT

**WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE**

**No. 87-00001-01-L(B)
87-00063-01-L(B)**

UNITED STATES OF AMERICA

v.

GOBEL LEE NEWSOME

ORDER—April 30, 1987

Motion having been made, and the Court being sufficiently advised;

It Is HEREBY ORDERED that the above-styled Defendant's indictments are dismissed with prejudice.

Judge, United States District Court
Western District Of Kentucky At
Louisville

Date: _____

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. Cr 87-00063-01-L(B)

UNITED STATES OF AMERICA - - - - - *Plaintiff*

v.

GOBEL LEE NEWSOME - - - - - *Defendant*

MEMORANDUM AND ORDER—Entered August 12, 1987

This matter is before the Court on the motion of the defendant to dismiss the indictment alleging violation of the Speedy Trial Act. Title 18 U.S.C. § 3161 *et seq.*

Defendant was indicted on three counts of violation of Title 18 U.S.C. App. II § 1202. That indictment was returned January 5, 1987. Defendant initially appeared on January 20, 1987. On that date the speedy trial clock began to run.

On March 9, 1987, defendant moved to suppress the evidence and the clock stopped after running for 47 days. A suppression hearing was scheduled for March 30, 1987.

On March 20, 1987, defendant moved to withdraw his suppression motion. That motion was granted on March 24, 1987, and the clock started again.¹

On April 13, 1987, the Court ordered the action assigned to April 20, 1987, for trial. On April 15, 1987, the motion of

¹Arguably, the clock did not start to run again until March 30, the date set for the suppression hearing.

the United States to dismiss the indictment was granted, and the clock stopped after either 22 days or 16 days.

On April 20, 1987, a superseding indictment was returned and on April 30, 1987, defendant filed his motion to dismiss.

As we compute the time, the limitation of the Speedy Trial Act has not been reached, but even if our calculations are in error, defendant has shown no prejudice resulting from the delay, nor has there been any showing that the delay was intended to hamper defendant's ability to present his defense. See e.g., *United States v. Tedesco*, 726 F. 2d 1216 (7th Cir. 1984); *United States v. Darby*, 744 F. 2d 1508 (11th Cir. 1984).

The motion to dismiss will be denied, and the matter will remain on the Court's trial docket.

IT IS SO ORDERED this 12th day of August, 1987.

(s) Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
United States District Judge

Copies to counsel